UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BANK OF NEW YORK MELLON, a Delaware corporation, as trustee for Structured Asset Mortgage Investments II Trust, Mortgage Pass-Through Certificates Series 2005-AR2, Plaintiff, v. SCOTT STAFNE, et al., Defendants.	C16-77-TSZ ORDER

THIS MATTER comes before the Court on various motions filed by both plaintiff and defendant Scott Stafne. Stafne has filed a Motion to Prove Authority to Bring Lawsuit, docket no. 28; a Motion to Dismiss Pursuant to FRCP 12(b)(1), docket no. 42; and a Motion for Protective Order, docket no. 51. Plaintiff has filed a Motion to Substitute Real Party in Interest, docket no. 36; and a Motion to Compel Discovery, docket no. 40. The Court will address each motion in turn.

Background

This is a simple case about a homeowner defaulting on his mortgage. Through this latest series of motions, the focus has shifted onto which entity has the right to sue, the attorney-client relationship, and standing and subject-matter jurisdiction. Put briefly, Scott Stafne borrowed $800,000 from Countrywide Home Loans, Inc. in 2005 to finance the purchase of a home in Arlington, Washington, executing a Deed of Trust and promissory note. Countrywide subsequently transferred the note to JPMorgan Chase Bank, N.A. ("Chase"), as then-trustee for Structured Asset Mortgage Investments II Trust 2005-AR2 ("SAMI"). In September 2006, Chase sold its trustee business for this type of investment to the Bank of New York, thus transferring the trusteeship of SAMI to the Bank of New York. The Bank of New York thereafter acquired via merger the Mellon Financial Corporation and became the Bank of New York Mellon, from where much of the current confusion springs. By 2009 Stafne fell into default on his debt, spurring heavy correspondence between Countrywide, as servicer, and Stafne. By this point the Bank of New York Mellon contracted with Nationstar as its attorney-in-fact to conduct certain foreclosure business. Nationstar thereafter engaged plaintiff's counsel to proceed with a judicial foreclosure. The Court previously denied Stafne's Motion to Dismiss For Lack of Subject Matter Jurisdiction. *See* docket no. 22.

Discussion

A. Motion to Substitute Real Party in Interest

The Court first addresses plaintiff's motion to substitute the Bank of New York Mellon, a New York corporation ("BONY"), in place of its corporate parent Bank of

New York Mellon, a Delaware corporation ("BNYM"). *See* docket no. 36. This motion arises out of a mistake by BNYM's attorney-in-fact, Nationstar, as to which entity within the Bank of New York Mellon corporate family was in fact the trustee for SAMI, and thus the proper entity to sue. The genesis of the difficulty appears to be that Stafne's promissory note was eventually indorsed, somewhat ambiguously, to "The Bank of New York Mellon F/K/A The Bank of New York, Successor Trustee, To JPMorgan Chase Bank, As Trustee." Janati Decl., docket no. 39, Ex. B. Nationstar subsequently examined its internal records and saw that "The Bank of New York, Mellon Corporation" was noted as the trustee of SAMI, concluding that this listing referred to BNYM. Johnson Decl., docket no. 37, ¶ 4; Ex. A. Accordingly, the complaint was drawn up with BNYM listed as plaintiff. After motion practice that attacked BNYM's propriety as plaintiff on different grounds, *see* docket no. 11, it came to light that BONY, not its corporate parent BNYM, was the proper trustee of SAMI. Plaintiff brings this motion to substitute BONY in its place.

Rule 17(a)(3) allows for the substitution of the real party in interest "as if [the action] had been originally commenced by the real party in interest." The rule "provides a liberal standard for the substitution of the real party in interest," *Beaudu v. Starwood Hotels & Resorts Worldwide, Inc.*, 2005 WL 1877344, *1 (W.D. Wash. Aug. 8, 2005), so as to "prevent forfeiture of an action" when a "reasonable mistake has been made." *United States for Use & Benefit of Wulff v. CMA, Inc.*, 890 F.2d 1070, 1074 (9th Cir. 1989).

Despite the leniency of the rule and its salutary purpose, Stafne contends the suit must be dismissed. Stafne's argument flows as follows: BNYM is not the trustee for SAMI which means it has no standing to sue, depriving this Court of subject-matter jurisdiction, resulting in there being no case for BONY to substitute into. Put another way, defendant argues that the fact BNYM is not the trustee creates a jurisdictional defect that Rule 17 cannot repair. However, Stafne's argument misapprehends the relationship between standing and the merits. Courts regularly grant motions to substitute in the correct corporate entity in analogous situations. *See, e.g.*, *Liberty Mut. Ins. Group v. Panelized Structures, Inc.*, 2013 WL 760343, *3 (D. Nev. Feb. 26, 2013) (distinguishing parent-subsidiary relationship from unrelated entities); *Siemens USA Holdings, Inc. v. United States*, 960 F. Supp. 2d 221, 225 (D.D.C. 2013) (permitting corporate parent to file motion to substitute in subsidiary). Defendant's argument that BNYM lacks standing to make such a motion "completely ignores the rule's substitution provisions, which specifically contemplate transfer from a non-party to the real party in interest without any interruption of the proceedings." *Liberty Mut. Ins. Group.*, 2013 WL 760343 at *4. Further, whether an entity has enforceable contractual rights relates to the merits, not standing. *Lindsey v. Starwood Hotels & Resorts Worldwide Inc.*, 409 Fed. App'x 77, 78 (9th Cir. 2010). The Court concludes that the wrong corporate entity was listed as plaintiff due to a reasonable mistake that has not prejudiced any defendant. *See United*

States for Use & Benefit of Wulff, 890 F.2d at 1074. Accepting Stafne's argument would result in a forfeiture, the very outcome that the drafters of Rule 17 strove to avoid.[1]

Accordingly, plaintiff's motion, docket no. 36, is GRANTED.[2] BONY is hereby substituted in place of BNYM. The Clerk is DIRECTED to modify the caption to reflect that the Bank of New York Mellon, a New York banking corporation, is substituted in this action for Bank of New York Mellon, a Delaware corporation.

B. Motion to Prove Authority to Bring Lawsuit

Stafne next moves to require plaintiff's counsel, Davis Wright Tremaine ("DWT"), to "provide proof of their authority to act as attorneys, pursuant to an attorney-client relationship, with regard to" a slew of BNYM corporate entities. *See* docket no.

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[1] The two cases defendant relies upon are easily distinguishable. The first, *Zurich Insurance Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002), involved "sister companies under the common ownership of a single corporate entity," as opposed to a parent-subsidiary relationship *Id.* at 533 (Gilman, J., concurring) ("In my opinion, any or all of [real party in interest's] direct or indirect owners … would have had constitutional standing to bring suit against [defendant], even though none of these parent entities is the real party in interest."); *see also* 13A C. Wright & A. Miller, Federal Practice & Procedure, § 3531 n.61 (3d ed. 2014) (describing the *Zurich* decision as "particularly troubling"). The other, *Cortlandt Street Recovery Corp. v. Hellas Telecommunications, S.a.r.l*, 790 F.3d 411 (2d Cir. 2015) merely observed the issue created by *Zurich*, with the opinion's author adding, in a separate concurrence, that *Zurich* "is not the law of this [Second] Circuit, and … [I] express some doubt that it should be." *Id.* at 425 (Sack, J., concurring).

[2] The Court thus necessarily rejects defendant's argument that BNYM is judicially estopped from seeking to substitute BONY in its place. The Ninth Circuit has held that if "incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppels does not apply." *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 994 (9th Cir. 2012) (quoting *Johnson v. Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998)). There is no evidence BNYM sought to perpetrate a fraud on the Court by its earlier representations that it was the trustee of SAMI, and the Court is unsure how such a change in position inures to BNYM or BONY's benefit.

28. However, Stafne lacks a good-faith basis to argue that DWT lacks such a relationship. Apparently Stafne has made this same argument in the past against DWT. *See Robertson v. GMAC Mortgage LLC*, C12-2017-MJP, docket no. 82 (W.D. Wash. Feb. 19, 2013) (Pechman, J.). Judge Pechman wrote that such a motion "is wholly without merit, unnecessary and is frivolous." *Id.* at *3. This Court agrees, and the motion is DENIED.

C. Motion to Compel

Plaintiff additionally moves to compel defendant Stafne to produce discovery in response to its First Requests for Production of Documents and Requests for Admission served on May 23, 2016. *See* docket no. 40; Burnside Decl., docket no. 41, ¶ 6. In his response, Stafne states that his position is that he "does not have to go to the time and expense of further discovery until this Court rules on DWT's Motion to Substitute." Stafne's Resp., docket no. 46, at 2. He then continues by addressing the merits of BNYM's motion to substitute, discussed *supra*. Even that discussion veers into an argument founded on the statute of limitations.[3] Nowhere, however, does Stafne provide a basis for ignoring validly propounded discovery requests.

In his response to the Requests for Production ("RFPS") Stafne by and large responded that the "documents are available for inspection during reasonable office hours upon reasonable notice." *See* Burnside Decl., docket no. 41, Ex. F (Stafne's Responses at 10). Plaintiff's counsel agreed to send someone to Stafne's office to copy documents on Friday, June 24, 2016, but on the day before Stafne stated he would not be available and would only permit DWT to make copies on his copier at a rate Stafne would determine. *Id.* Ex. G. However, soon after plaintiff filed its motion to substitute Stafne wrote an email informing plaintiff that he had decided to not turn over discovery because he would shortly be filing a motion to dismiss for "constitutional imperfections." *Id.* Ex. I.

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[3] The Court declines Stafne's invitation to re-examine its previous findings as to diversity jurisdiction. The only impact of granting BNYM's motion to substitute is to replace one diverse party, BNYM (a Delaware corporation), with another, BONY (a New York corporation). This swap has no impact on the diversity calculus.

A party objecting to discovery must either seek a protective order or provide written objections. *See In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 337 (N.D. Cal. 2005). Stafne has done neither with respect to the RFPs. Plaintiff's Motion to Compel, docket no. 40, is GRANTED. The Court ORDERS defendant Scott Stafne to produce all-non privileged, responsive documents to plaintiff's counsel's office by 5:00 pm on Wednesday, August 31, 2016. Stafne will bear the cost of making such production.

D. Motion to Dismiss

Defendant Stafne additionally brings a motion to dismiss for lack of subject matter jurisdiction, once again arguing that DWT lacks an attorney-client relationship with a plaintiff who has standing to sue. In addition, Stafne contends that the Power of Attorney through which plaintiff engaged Nationstar (and thus through which Nationstar engaged DWT) does not allow for DWT to invoke the Court's jurisdiction. *See* docket no. 42. On the whole, Stafne's motion merely reiterates the same arguments that are the subject of the pending motions, and thus it is DENIED for the reasons discussed above.

E. Motion for Protective Order

The last motion before the Court is by Stafne and entitled a "Motion for Protective Order" to prevent the continuation of his deposition because, chiefly, "presently there is no plaintiff with standing and/or any real party in interest bringing this case against Stafne." *See* docket no. 51. Thus, Stafne's motion is in essence a recycling of his previous argument that the Court lacks subject-matter jurisdiction because of the issues discussed *supra* with regards to the real party in interest. As the Court has already addressed those arguments, Stafne's motion, docket no. 51, is DENIED.

IT IS SO ORDERED.

Dated this 9th day of August, 2016.

Thomas S. Zilly
United States District Judge